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In The

Supreme Court of the United States

October Term, 1993

NATIONAL ORGANIZATION FOR WOMEN, INC., *et al.*,

Petitioners,

v.

JOSEPH SCHEIDLER, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

Brief of People for the Ethical Treatment of Animals, Inc., The PETA Gay and Lesbian Task Force, Community for Creative Nonviolence, The Fund for Animals, Inc., New England Anti-Vivisection Society, Los Angeles Earth First!, Northcoast Earth First!, Feminists for Animal Rights, Sea Shepherd Society, Fossil Fuels Policy Action Institute, Animal Law Enforcement Association, Foundation to Support Animal Protection, Inc., *Amici Curiae*, in Support of Respondents

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QUESTIONS PRESENTED

1. Whether the federal Racketeer Influenced and Corrupt Organizations [RICO] Act, 18 U.S.C. § 1962, should be construed broadly to apply to unlawful activity not motivated by economic objectives, including acts of civil disobedience with a revered history, so as to impair vigorous social and political advocacy.

2. Whether constitutionally protected solicitation of donations to an activist organization should be construed as evidence of an economic motivation for the organization's activities, triggering the application of RICO.

3. Whether RICO should be applied to an organization that advocates social or political change without differentiating members of such an organization who know of and authorize illegal tactics by that organization from members who are truly innocent of any illegal act.

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INTERESTS OF *AMICI*

People for the Ethical Treatment of Animals, Inc. ("PETA"), The PETA Gay and Lesbian Task Force, community for Creative Nonviolence, The Fund for Animals, Inc., New England Anti-Vivisection Society, Los Angeles Earth First!, Northcoast Earth First!, Feminists for Animal

Rights, Sea Shepherd Society, Fossil Fuels Policy Action Institute, Animal Law Enforcement Association, Foundation to Support Animal Protection, Inc., ("*Amici*") are nonprofit organizations that promote a variety of social causes. These causes can be generally described as stopping the destruction of the ecology, advocating the interests of and serving the needs of homeless people, and ending cruelty to animals. *Amici* include large, national, tax-exempt, nonprofit corporations based in Washington, D.C., New York, California, and Boston, as well as "grassroots" organizations that are less centrally based throughout the country. They represent well over one-half million members and supporters nationwide. They operate throughout the United States and abroad.

Amici advocate social and political change exclusively or primarily through lawful means. Some supporters or sympathizers of the movements that *Amici* espouse have, on occasion, committed acts of nonviolent civil disobedience in order to bring public attention to laws or practices that they find objectionable and that, they believe, the public would find similarly objectionable if the public were fully aware of them. Some of these acts could, under a very broad (unduly broad, *Amici* assert) reading of the RICO statute, constitute "predicate acts" under 18 U.S.C. § 1961(1).

Amici urge the Court that such a broad reading would constitute an unwarranted excursion into political and social advocacy and dissent not targeted by Congress when it enacted the RICO statute. It would have a strong chilling effect on activists whose nonviolent acts of civil disobedience might otherwise bring only minor sanctions, but who would rightly fear severe penalties under

RICO. Social dissent, including civil disobedience, plays such an important role in shaping our society that the judiciary should not expand RICO to apply to such activity without a clear mandate from Congress to do so.

Consequently, *Amici* urge the Court to affirm the judgment below dismissing the application of RICO to the actions of the respondents.

Amici emphasize that they take no view whatever on the issue of abortion. Some members and supporters of *Amici* strongly support broad freedom of choice for women who seek abortion, and some do not. The interests of *Amici* in this case relate solely to the legal issues raised in this appeal. This brief is filed with the consent of the parties.

SUMMARY OF ARGUMENT

Amici urge three simple propositions in this brief.

First, RICO should not be construed in a manner that would impair social and political advocacy rather than economically motivated enterprises. As the Court of Appeals held in this case, and as other courts have found through careful analysis of the RICO statute and its legislative history, Congress simply did not intend to reach social and political advocacy when it enacted RICO. Rather, in enacting RICO, Congress targeted organized crime and similar illicit, economically motivated "enterprises." Moreover, federalism dictates that courts remain wary of construing federal laws as impinging on the proper role of the States in punishing activity that offends

against the peace and dignity of their communities. Various other state and federal laws adequately address unlawful acts committed as part of social and political advocacy. Absent a clear mandate by Congress, the Court should not expand RICO into a new, draconian measure available to prosecutors and civil plaintiffs as a means of stifling social and political dissent.

Second, the solicitation or receipt of donations by an organization engaged in social and political advocacy should not be considered evidence of an economic motivation for that advocacy. Donations are related to an organization's activities, if at all, only incidentally. They are not the direct result of advocacy activities in the way economic gains are the direct product of traditional RICO crimes. Moreover, unlike enterprises clearly targeted under RICO, nonprofit organizations use their funds solely to further their programs, and may not and do not allow those funds to inure to the benefit of those who control the organizations. (This assumes, of course, that no showing of inurement or private benefit is made by a RICO plaintiff. No such showing was made in the instant case, nor could one be made with respect to *Amici*.)

Finally, RICO should not be applied to an organization that advocates radical social and political change without differentiating members of the organization who know and approve of illegal tactics from members who are innocent of those tactics.

ARGUMENT

I. The federal Racketeer Influenced Corrupt Organizations [RICO] Act should not be construed in a manner that would diminish vigorous advocacy for social and political change.

A. The need for judicial restraint in regard to expansion of RICO to other than economically motivated activities

The courts below, the respondents, and other courts have amply argued the case for judicial restraint on the expansion of RICO to other than economically motivated activities. See *National Organization for Women, Inc. v. Scheidler*, 968 F.2d 612 (7th Cir. 1992); *National Organization for Women, Inc. v. Scheidler*, 765 F.Supp. 937 (N.D.Ill. 1991); *Brief of Respondent*; *United States v. Flynn*, 852 F.2d 1045 (8th Cir. 1988); *United States v. Ivic*, 700 F.2d 51 (2d Cir. 1983). *But see, e.g., Women's Center, Inc. v. McGonagle*, 868 F.2d 1342 (3d Cir. 1989), *cert. denied*, 493 U.S. 901 (1989). *Amici* generally endorse, but will not repeat, those arguments here.

This brief is intended primarily to emphasize the chilling effect that a judicial expansion of RICO beyond economically motivated crimes would have on social and political advocacy of all kinds. Unlike the assertions of the NOW Legal Defense and Education Fund ("NOW-LDF") in its Brief *Amicus Curiae*, the impact of such an expansion would not be limited to violent activity. RICO, by its very terms, applies to a broad array of nonviolent crimes. Also, as discussed below, social advocacy has not always been serene, yet there is no evidence that Congress had vigorous or even violent dissent in mind when

it enacted RICO; on the contrary, the specific target of RICO was and is abundantly clear.

A judicial expansion of RICO would cast a pall on the social and political advocacy that has historically been perhaps the most important catalyst for progress in America. Activists would never know if relatively minor infractions, committed as a part of a campaign to stimulate public awareness, could result in the heavy sanctions of RICO. Prosecutors and civil plaintiffs opposed to social change would have an awesome new weapon to stifle unpopular causes, and would likely use that weapon. The Court should be wary of unleashing such a potent force without a clear mandate from Congress.

Amici are careful to note that, in urging that limits be maintained on RICO, we and our sympathizers do not seek to evade all legal responsibility for our acts. Crimes such as trespass or disturbing the peace are punishable by fines and/or imprisonment, sanctions that many important figures in American history have been willing to bear as advocates for social progress. More serious crimes, too, are adequately addressed by other state and federal laws. *Amici* simply urge the Court that a prosecutor or civil plaintiff should not be able to invoke an additional law – one not intended to stifle social dissent – simply by arguing creatively that such activities constitute, for example, "interference with commerce" or "extortion" under RICO.

To illustrate, imagine the following hypothetical situations.

First, after repeated, unsuccessful efforts to reach a nonviolent settlement with owners of commercial whaling vessels to cease their activity, activists committed to ending the slaughter of whales deliberately interfere with the hunt by chasing whales away from the whalers and by blocking the whalers' path. The activists then publicize this event to draw public attention to the need for action in defense of whales. The owners of the vesse' sue for damages in a civil action in a federal district court with appropriate jurisdiction, and the court awards damages. If the activists decide to repeat this action or to use another form of civil disobedience to call attention to the plight of whales, should the second plaintiff be able to apply RICO to the activists or, without more, to an organization in which they are members simply because that organization espouses similar goals?

Second, imagine that activists committed to the protection of wild animals have made every reasonable effort to persuade an owner of a fur store that the sale of the skins of animals such as baby seal pups entails barbaric slaughter of these animals and that the owner should not sell garments made from such skins. Activists then protest the sale of fur by marching peacefully with signs on the public sidewalk in front of the store. Other supporters of the protest enter the fur store and surreptitiously place anti-fur messages in the pockets of garments in the store. As in the prior hypothetical, the owners of the store sue for damages in a civil action in a federal district court with appropriate jurisdiction, and the court awards damages. If the activists decide to repeat this action or use another form of civil disobedience to call attention to the

plight of seal pups, should the second plaintiff be able to apply RICO to the activists?

Third, imagine that activists opposed to vivisection have learned of a research center that is engaged in needless destruction of animals for no apparent scientific good, and that there is a complete failure to reach an accord with the research center at least to eliminate the projects that result in the needless destruction of animals. Activists then enter the research center without permission and conduct a sit-in to draw public attention to the experiments, which they denounce in a news release as "needless, wasteful, and cruel." As in the prior hypothetical, the owners of the research center sue for damages in a civil action in a federal district court with appropriate jurisdiction, and the court awards damages. If the activists decide to repeat this action or use another form of civil disobedience, should the second plaintiff be able to apply RICO to the activists?

Under the theory of the petitioners, the answer to each of these three questions must be in the affirmative. The repetition of acts that are not constitutionally protected suffices in the theory of the petitioners to count as the predicate act of "extortion" under RICO, and to subject any activist social protest movement – and its members – to the sanctions of the Act, including stiff criminal sentences for a federal felony conviction, the potential loss of the franchise that is entailed in a felony conviction, treble damages, and forfeiture of any property that might have been used in the protest activities deemed an act of "extortion" under the Hobbs Act, 18 U.S.C. § 1951.

B. Concerns of Federalism

The theory of the petitioners is too clever by half. The half they forgot about is the role of the States in punishing activity that offends against the peace and dignity of their communities. *Amici* do not urge that activists who engage in law violation should be free of any sanction for their behavior. On the contrary, we acknowledge that, under applicable State law, both civil and criminal consequences may flow from this kind of activity. On the other hand, the petitioners apparently want the federal judiciary to become the normal forum for disposing – at very high stakes – of their ideological opponents.

People like the respondents – and they are by no means limited to right-to-life advocates – have been willing to risk the occasional violation of the law through civil disobedience in part because the realistic consequences were appropriate to the offense. For example, the defendants might receive appropriate fines and sentences that are tailored to the particular circumstances of the offense. RICO would replace appropriate sanctions for civil disobedience with disproportionate sanctions designed for reviled and truly dangerous criminal activity of organized crime. If the theory of the petitioners is correct, moreover, federal judges applying the criminal provisions of RICO to civil disobedience will have little or no discretion under the new federal sentencing guidelines to take into account the grounding of any particular defendant's behavior in a sincerely held conscientious conviction that the law in its current state must be disobeyed. In short, the petitioners seek to "up the ante" for

behavior that witnesses against their convictions, perhaps with the hope that it will thereby be diminished or go away.

The petitioners do not seek to eliminate State jurisdiction over crime altogether. They presumably would allow a State to treat as a local tort or crime, subject to garden variety civil and criminal sanctions, an act of trespass by a neighbor who crosses a property line solely for self-serving personal gain or who is at best inattentive to the well being of the community. If, however, acts of trespass on private property are grounded in social and political ends that are not popular, then – in the view of the petitioners and their *Amici* – then the heavy arm of the federal anti-racketeering statute should be used to sanction acts of trespass.

This is not a very healthy view of "Our Federalism." In *Younger v. Harris*, 401 U.S. 37 (1971), and its progeny, this Court has repeatedly taught that the federal courts should normally stay their hand to allow the State courts to exercise appropriate jurisdiction over matters of concern to the several States. The effect of accepting the petitioners' theory would be to expand exponentially the jurisdiction of federal courts over matters that traditionally have been thought to be well within the province of State and local law.

In addition, the damage to the vitality of vigorous protest movements – an important *federal* interest that *Amici* must assert here because the United States has

declined to do so in its amicus brief[1] – entailed in the petitioners' theory seems clear. In the view of the petitioners, trespass or damage to property should be dramatically escalated if it is meant to convey a message with which the petitioners disagree. Unless the court of appeals is affirmed, it will become open season for the ideological adversaries of animal rights advocates and environmentalists who engage in acts remarkably similar to those of the respondents in this case.

There is and there ought to be a lot of room in the law between activity that is unqualifiedly protected under the First Amendment and activity that is severely punished under a federal statute in which Congress took aim at organized crime. The reach of RICO is now clearly well beyond groups like "the Mafia," but that does not mean that this Court is powerless to articulate principled limits on the use of the federal government to wreak vengeance against ideological adversaries on the burning political issues of the day. For this reason, *Amici* urge this Court to act with caution when the federal courts are called upon to approve a radical extension of RICO to

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[1] Attorney General Reno addressed the annual meeting of the American Law Institute last May, flagging as problematic the increasing tendency of the federal government to increase its jurisdiction over matters that previously had been thought to be the concern of State law. Far from acknowledging the gravity of this problem, the brief filed by the Solicitor General in this case marches in the opposite direction, seeking to expand federal prosecution of garden variety State crimes without a clear statement of congressional intent to upset the traditional balance between the federal government and the States. *See New York v. United States*, 112 S.Ct 2408, 2425 (1992); *United States v. Bass*, 404 U.S. 336, 349 (1971).

activity that is already punishable under applicable statutes of the several States, and a radical expansion of RICO that is not demonstrably clear either in the text of the statute or its surrounding history.

Even if Congress were to amend RICO expressly to confer jurisdiction upon federal courts over conduct such as that complained of here, there would still be issues of constitutional limits on such an Act if it were to chill protected expression or activity. But this case does not require the Court to strike down an Act of Congress for the simple reason that it does not now have such a statute before it. All that is necessary is that the Court decline to accept petitioners' invitation to read the statute as expansively as they would like the Court to do. Petitioners, of course, have already reverted to the political branches to attempt to obtain the revolutionary transformation of responsibility for the prosecution of local crimes that they evidently desire. *See* S. 636, "Freedom of Access to Clinic Entrances Act of 1993"; H.R. 796, "Freedom of Access to Reproductive Services Act of 1993," 103d Cong., 1st Sess. (1993). For that very reason they should not expect this Court to adopt their fanciful and dangerously expansive theory of RICO.

The causes that *Amici* support are sometimes unpopular with establishment forces. Thus there are very practical reasons for judicial concern about the protection of the rights of vulnerable minorities to engage in meaningful protest, especially when it is aimed at current governmental policy. *Gentile v. State Bar of Nevada*, 501 U.S. ___, 111 S.Ct. 2720, 2724 (1992) ("speech critical of the exercise of the State's power lies at the very center of the First Amendment").

C. The Importance of Social Protest in America

This nation is renowned for its contribution to the rule of law. Embodying this spirit is the epigram of Robert Hale inscribed on the Department of Justice: "We are a government of laws, not of men." This truth is not contradicted, but is reinforced by the apparently paradoxical fact that the law has developed in this country in part because of those who have had the courage to disobey it. As Justice Marshall reminded us during the Bicentennial of our Constitution, not everything about this country's past – including slavery and the exclusion of women from participation in the democracy – is cause for rejoicing. Thurgood Marshall, Reflections on the Bicentennial of the United States Constitution, 26 *Valparaiso U. L. Rev.* 21 (1991).

Because this is so, we are a people with both a strong respect for the civilizing force of law and a healthy regard for the moral limits on law itself acknowledged in the tradition of civil disobedience, including episodes of confrontation with authority, that can be found in virtually every period of American history. *See, e.g., Civil Disobedience in America: A Documentary History* (David Weber ed. 1978); Carl Cohen, *Civil Disobedience: Conscience, Tactics, and the Law* (1971); and Edward Madden, *Civil Disobedience and Moral Law in Nineteenth-Century American Philosophy* (1968). NOW-LDF would have the Court believe that expansion of RICO to other than economically motivated crimes would not hinder social dissent. They argue that RICO would reach only violent crime and so could not be used to hinder the progressive movements to which they refer in their brief. But, again, RICO

applies to many nonviolent crimes by its express terms. Moreover, social advocacy has not always been so serene as NOW-LDF makes out and, under the theory advanced in their brief, many of the social movements described by NOW-LDF would have been halted by RICO. We see no support for any contention that Congress intended that result in enacting RICO. No matter what view this Court adopts with respect to the reading of RICO that the Court of Appeals espoused in this case, *Amici* urge this Court not to rely upon the bland reading of American history offered to it in the NOW-LDF Amicus Brief, at 18-25.

As we show below, much of the violence surrounding civil disobedience was visited upon, not by, the protesters. But we do not maintain that American protesters in the past did nothing but sit down to tea with their adversaries. Indeed, from the famous "tea party" in Boston on December 16, 1773, protesting in an angry, violent manner the British tax on tea after the repeal of the Townshend Acts, to the massive demonstrations against the Vietnam War two centuries later, our history has been unmistakably marked with protest movements that have involved clashes with authority and intentional violations of the law. At the time of the protests, very few found the behavior of these dissidents comfortable, palatable, or even tolerable. Dissidents have, accordingly, suffered the imposition of fines and other criminal sanctions for the courage of their convictions.

In recent times we frequently compared ourselves favorably to totalitarian regimes of the Left and the Right that swallowed up their opposition, sending them to the death camps and the Gulags for extermination. We take some pride in the way we have tolerated the strong voice

of protest within our legal and political culture. Perhaps we have taken too much pride in our treatment of dissidents in view of the harsh penalties that were frequently applied to them. Whatever the right blend of pride and humility about our past, it is undeniable that our dissidents have at many critical turning points of American history helped to shape our destiny. But it has been a lot easier to recognize the value of radical protest decades afterwards, when the position the protesters espoused was more broadly received by the people and incorporated into our laws.

A classic illustration of this point is the eradication of the slavery system, which nearly everyone in America would now regard as the just and rightful repudiation of a brutal and inhuman labor system. Some might claim that slavery might have been abolished earlier and with less bloodshed on the battlefields of the Civil War if the Abolitionists had been more "accommodating" to their adversaries, but this revisionist view overlooks the hard mindset of the slaveholders who would brook no compromise on the matter of slavery as an inalienable property right.

Whatever the possible outcome of alternative hypothetical scenarios, the fact remains that the Abolitionists were indeed radical in their day. The most famous of the Abolitionists, William Lloyd Garrison, was uncompromising in his campaign for immediate and complete abolition of slavery. In the first issue of *The Liberator* (Jan. 1, 1831) Garrison publicly renounced his previous position of gradual abolition and publicly asked "pardon of my God, of my country, and of my brethren, the poor slaves, for having uttered a [gradualist] sentiment so full of timidity,

injustice and absurdity." And he wrote: "urge me not to use moderation in a cause like the present! I am in earnest. I will not equivocate – I will not excuse – I will not retreat a single inch – AND I WILL BE HEARD." As cited in *The Abolitionists: A Collection of Their Writings* 31 (Louis Ruchames ed. 1963) (emphasis in original).

By and large Garrison preferred moral persuasion over violence, but it cannot be maintained that he was a total pacifist. Thus, after John Brown's raid at Harper's Ferry in 1859, Garrison noted that "no one who gloried in the legends of the Revolution could deny the right of slaves to revolt," and suggested that a "harvest of retribution" against the slaveowner was imminent since he had "forfeited his right to live." Lewis Perry, *Radical Abolitionism: Anarchy and the Government of God in Anti-slavery Thought* 259 (1973); *and see* Gerald Sorin, *Abolitionism: A New Perspective* 77-98 (1972).

It can plausibly be maintained that less famous Abolitionists were more effective in moving the hearts of their countrymen, but Garrison and the radical Abolitionists were ultimately heard indeed. As Garrison put it in the opening issue of *The Liberator*, "POSTERITY WILL BEAR TESTIMONY THAT I WAS RIGHT." As cited in *The Abolitionists: A Collection of Their Writings* 31 (Louis Ruchames ed. 1963) (emphasis in original). Although not all of the acts of the Abolitionists would gain support even today, the basic thrust of their movement has now clearly prevailed in American law. Decades after the failure of the problematic period of "Reconstruction" – itself

a dramatically violent period[2] – we are now more committed than ever to the enforcement of the Civil War Amendments that would have been inconceivable without the firm resolve of the "Radical Republicans" and their moral progenitors, the Abolitionists.

The NOW-LDF brief would have this Court imagine that the period from the adoption of the Civil War amendments in the late nineteenth century to the adoption of legal protection for women and minorities, has been a calm and serene passage, free from violence. In the revisionist version of history offered in this brief, these *Amici* would have the Court believe that nonviolence reigned supreme in all of the four protest movements explored in this brief. Brief Amicus Curiae of the NOW-LDF (exploring the Abolitionist Movement, at 19-20, the Woman's Suffrage Movement, at 20-21, the Civil Rights Movement, at 22-23, and the Gay Rights Movement, at 23-25).

The halcyon perspective in the NOW-LDF brief is wishful remembering of the past, artfully dodging the tragic reality of all four of these periods of American history. We discuss each of these periods briefly. We do so not to endorse violence, and much less so to suggest that it ought not to have any legal consequences. On the contrary, we do not wish to suggest that any of the *Amici* – or the respondents, for that matter – are committed to anything but nonviolent protest. But we simply suggest

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[2] *See, e.g.*, Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863-1877* (1988); Hans Trefousse, *The Radical Republicans: Lincoln's Vanguard for Racial Justice* (1969); and Kenneth Stampp, *The Era of Reconstruction, 1865-1877* (1965).

that the line between violence and nonviolence is not always easily drawn, for the characterization of an act as violent or nonviolent depends sometimes on the collective consciousness of whose violence is being recalled, and from what perspective the acts are viewed. For example, Bull Connors undoubtedly thought he was preserving the peace against lawless agitators in Birmingham, but most of us saw the violence in the bared teeth of his dogs. Our point is that Congress did not intend to draw such lines or to stifle any type of social dissent when it enacted RICO.

First, we have already discussed the Abolitionists above. We now add that the American Anti-Slavery Society, of which Garrison was President from 1843 to 1865, regularly burned a copy of the Constitution at its annual meeting in Boston, denouncing that document – because of its flawed compromise on slavery – as "a compact with death, a covenant with hell" (citing *Isaiah* 28:15); *see* Edward McGlynn Gaffney, Politics Without Brackets on Religious Convictions, 64 *Tulane L. Rev.* 1143, 1165 (1990).

Under modern precedents that sort of activity would certainly be deemed protected. *See Texas v. Johnson*, 491 U.S. 397 (1989) (burning of American flag protected); *but see United States v. O'Brien*, 391 U.S. 367 (1968) (burning of draft card not protected). So would many of the incendiary speeches that the Abolitionists delivered, even though devastating violence ensued in places like "bleeding Kansas."[3] *See Brandenburg v. Ohio*, 395 U.S. 444 (1969)

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[3] For an account of the bloody conflict in the Kansas Territory over slavery in the 1850's, *see* David Potter, *The Impending*

(per curiam). But under the law as it then stood, these acts were not protected under the First Amendment. The acts in question included the unlawful operation of the "Underground Railroad" to assist slaves to flee from their masters, *see* Gaffney, Politics Without Brackets on Religious Convictions, 64 *Tulane L. Rev.* 1143, 1160, and the "rescuing" of slaves from the very courtrooms where their extradition hearings under the Fugitive Slave Act were being held, *see* Aviam Soifer, Status, Contract, and Promises Unkept, 96 *Yale L. J.* 1916, 1919 (1987), and Stephen Campbell, *The Slave Catchers: Enforcement of the Fugitive Slave Law, 1850-1860* 149 (1968). One consequence for these acts is that the Abolitionists suffered violence for their views not only at the hands of private parties, but also at the hands of the government.

Second, the feminists of the nineteenth century were by no means confined to the rosy-tinted picture painted in the NOW-LDF Brief. Susan B. Anthony is dealt with as an advocate for the enfranchisement of women, which she certainly was. No mention is made of her role as an agent of the American Anti-Slavery Society, in which capacity she urged an audience before the Civil War to "overthrow this government, commit its blood-stained Constitution to the flames, blot out every vestige of that guilty bargain of the father." As cited in Alma Luz, "Susan Brownell Anthony," in 1 *Notable American Women, 1607-1950: A Biographical Dictionary* 53 (Edward James ed. 1971).

Crisis, 1848-1861 199-224 (1976), and Louis Filler, *The Crusade Against Slavery, 1830-1860* 218-257 (1960).

Even in the voting area, the NOW-LDF Brief appears not to be blind to the similarities between the facts they narrate and the typical acts of protest engaged in by the respondents. Indeed, this similarity is borne out in the details of the very case they cite relating to the criminal conviction of Susan B. Anthony for voting in Rochester in 1872 before a constitutional amendment expressly allowed it. *United States v. Anthony*, 24 F. Cas. 829 (C.C.N.D.N.Y. 1873). The transcript of Anthony's bold statement before her sentencing makes clear that she was prepared to risk not only violating the law as it then stood, but also being found in contempt of court. Anthony continued to speak powerfully about the injustice of her conviction after Judge Hunt warned her seven times to the effect that "The Court can not allow the prisoner to go on." After she finally sat down, the Court required her to stand up to hear her sentence, and she then told the Court: "May it please your honor, I shall never pay a dollar of your unjust penalty. . . . I shall earnestly and persistently continue to urge all women to the practical recognition of the old revolutionary maxim, that 'Resistance to tyranny is obedience to God.' " *Civil Disobedience in America: A Documentary History* 185-188 (David Weber ed. 1978).

Anthony was ultimately vindicated by the enactment of the Nineteenth Amendment, which was ratified in 1920, but only after several further bold acts of public protest unmasking the "hypocrisy" of President Woodrow Wilson's commitment to democracy for males in Europe, but not for females in America. As with the Abolitionists, so also the Suffragists suffered violence at

the hands of the federal troops dispatched by President Wilson to break up their rallies.

In focusing exclusively on the drive for women's franchise, the NOW-LDF brief omits any consideration of one of the most significant women's movements in this period, the drive for temperance, in which women played a leading, female-dominant role. Perhaps the omission is not due to ignorance, but to the similarity between the acts of the respondents complained of here and the militant tactics employed by famous nineteenth century feminists who led the temperance movement. For example, Carry Nation and others like her applied constant moral pressure on owners of saloons to discontinue their sale of alcohol, and were willing to disrupt their business by charging into saloons and destroying kegs of whiskey and beer with an ax. *See, e.g.*, Jack Clocker, *"Give to the Winds Thy Fears": The Women's Temperance Crusade, 1873-1874* 50, 76-77, 197 (1985) (describing violence by and against protesters); Joseph Gasfield, *Symbolic Crusade: Status Politics & the American Temperance Movement* (2d ed. 1986); Mother Stewart, *Memories of the Crusade, A Thrilling Account of the Great Uprising of the Women of Ohio in 1873, Against the Liquor Crime* (1972); *National Organization for Women v. Scheidler*, 968 F. 2d 612, 620 (7th Cir. 1992) (discussing role of women in Temperance Crusade).

Third, the Civil Rights Movement is depicted in the NOW-LDF brief as though everything were sweetly nonviolent. The recent attention to alternative leaders like Malcolm X should have made such a skewed account untenable. But the most remarkable part of the law-office history narrated in the NOW-LDF brief is that the very source it relies on, Taylor Branch's masterful account of

the "King years" in the civil rights movement, *Parting the Waters* (1988) is itself a rich source for the use of tactics of civil disobedience similar to those used by the respondents in this case.

Perhaps the most memorable recent use of civil disobedience to change the law was the efforts of the freedom riders and the people who "sat in" places of public accommodation that before the enactment of Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a, were segregated on the basis of race. In some cases this Court overturned convictions for breach of the peace or for trespass under State law, perhaps for the reason that the Court could no longer countenance the underlying State legislation requiring Jim Crow segregation, *see, e.g., Brown v. Louisiana*, 383 U.S. 131 (1966).[4] In other instances the Court declined to reverse criminal convictions of protestors under State law, pointing to other dimensions of the facts, such as the integrity of the State courthouse or a State jailhouse. *See, e.g., Cox v. Louisiana*, 379 U.S. 559 (1965); *Adderley v. Florida*, 385 U.S. 39 (1966). No matter which way these cases turned, the inescapable fact is that civil rights activists engaged in acts of civil disobedience remarkably similar to some of the acts of the respondents which the petitioners would now like to transform into federal felonies. No one would seriously maintain that Martin Luther King, Jr., or his colleagues in the Civil

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[4] In a series of "sit-in" cases brought before the enactment of Title II of the Civil Rights Act of 1964, the Court declined to hold expressly that the Jim Crow laws were themselves unconstitutional, but found an alternative ground on which to reverse the State law conviction. *See, e.g., Bouie v. Columbia*, 378 U.S. 347 (1964); *Bell v. Maryland*, 378 U.S. 226 (1964).

Rights movement, were the sort of "racketeer" that Congress had in mind when it enacted RICO.

Fourth, the sanitized version of the Gay Rights Movement offered in the NOW-LDF Brief omits any account of aggressive acts of trespass by the AIDS Coalition To Unleash Power ("ACT UP"), an AIDS advocacy organization that has occasionally resorted to conduct as disruptive as those of the respondents. For example, ACT UP members disrupted religious services by passing out condoms at St. Patrick's Cathedral in New York while Cardinal John O'Connor was distributing the bread of the Eucharist to communicants at a Sunday Mass. *See* Jason DeParle, 111 Held in St. Patrick's AIDS Protest, *New York Times*, Dec. 11, 1989, Sec. B, p. 3, Col. 4; and Editorial, The Storming of St. Pat's, *New York Times*, Dec. 12, 1989, sec. A, p. 24, col. 1 (criticizing demonstrators for turning "honorable dissent into dishonorable disruption"). Church authorities surely have some interest in the peace and security of their houses of worship. Even so, that does not mean that dissidents who disrupt religious services should be sueable under RICO, for State law suffices to redress the situation.

Even if it were true that right-to-life groups employ tactics unique to them when they violate the law – it plainly is not – , the danger of applying RICO to the respondents here is that there is no principled basis for limiting its application to other groups engaged in social and political protest, without unconstitutionally discriminating on the basis of the viewpoint of the protesters' message. *See, e.g., Chicago Police Dept. v. Mosley*, 408 U.S. 92 (1972).

The spirit of protest against the law has moved beyond the civil rights movement to many other movements of social protest. For example, environmentalists opposed to the harvesting of certain trees have chained themselves to logging equipment to prevent its use. *See, e.g., Huffman and Wright Logging Co. v. Wade*, 62 U.S.L.W. 2148 (Ore.S.Ct., Aug. 19, 1993) (affirming imposition of punitive damages against protestors who caused suspension of logging operations for most of one day).

Activists opposed to the possession and implied use of nuclear weapons have frequently engaged in trespass on federal property where such weapons are stored. For example, they have on occasion entered the Pentagon building and used religious imagery, pouring out blood to symbolize the shedding of blood in war, and sprinkling ashes to symbolize repentance for the taking of human life. *See, e.g., United States v. Cassidy*, 616 F. 2d 101 (4th Cir. 1979). Sometimes the target of the anti-nuclear war protesters has been a particular weapons delivery system, such as a B-52 bomber, which they damaged with a hammer to prevent its immediate use, *United States v. Allen*, 760 F. 2d 447 (2d Cir. 1985), or a Trident nuclear submarine, to which the defendants attached posters "indicting" General Dynamics and the United States for their participation in the manufacture of nuclear missiles, and on which they spray-painted the biblical injunction "Thou shalt not kill" (*Exodus* 20:13; *Deuteronomy* 5:17) after unlawfully entering the premises of the defense contractor, *State v. Champa*, 494 A. 2d 102 (R.I. 1985).

Over the past two decades persons opposed to the production and use of nuclear energy have not only stated their concerns about radioactive waste to Congress

and the relevant regulatory agencies. From New Hampshire to California they have also put their bodies on the line, chaining themselves to the entrance of nuclear power stations to inhibit access by workers to the facilities.

The point is not whether or not the lower courts have found this conduct protected under the Constitution, but simply that a variety of social protest movements have engaged in activity of this sort and that their conduct – if found unlawful – can and has been adequately proscribed under state and federal laws without invoking RICO. To use the federal racketeering laws against such protesters would send not a "big chill," but a sub-zero blast into all sorts of groups that have traditionally resorted to civil disobedience as a dramatic means of calling to public attention the infirmities of the law itself.

One of the petitioners' amici expressly targets some of the *Amici* – animal rights organizations – who have joined in this brief. Brief Amicus Curiae of the American Medical Association and American College of Obstetricians and Gynecologists, at 4, 22-23. The AMA-ACOG brief cites no cases linking any animal rights organization with the recent murder of health care workers, for the simple reason that there are none. Nonetheless, it impliedly holds these groups responsible for these tragic deaths. And it characterizes these groups as engaged in "medical vigilantism" and "political terrorism."[5] If the

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[5] After the recent signing of a Statement of Principles, the State of Israel has higher regard for the PLO than the AMA and the ACOG have for their ideological opponents. Rather than branding the PLO as "political terrorists," Israel now seems

reckless and highly inflammatory way in which the AMA-ACOG Brief has rushed to judgment against groups organized for the ethical treatment of animals is any indication of things to come, the federal judiciary will be very busy entertaining ideological controversies better fought out in the political branches.

II. Constitutionally protected solicitation of monetary donations to an activist organization should not be construed as evidence of an economic motivation for the organization's activities, triggering the application of RICO.

In their opening brief, the petitioners argue that they should not be held to demonstrate that an "enterprise" attacked under civil RICO has an economic motive. They concede for the sake of argument that plaintiffs in a RICO action should be required to demonstrate that parties sued under this statute have an economic motive for the conduct for which they are being sued. But then they suggest at 14, 45-48 that they should have survived a 12(b)(6) motion here because the respondents have profited from the conduct of which the petitioners complained. The economic benefit or "profit" to which the petitioners refer turns out to be routine organizational expenditures deriving from the free-will offerings or donations that people make to entities such as Operation Rescue.

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willing to recognize their former adversaries in a formal way and to pursue the prospect of peace with them. There may be a parable there.

This argument, if it can be called that, proves too little and too much. Too little, because petitioners have made no showing here of a nexus between the contributions to the petitioners and the sort of conduct of which the respondents complain. They merely assert that if a charitable organization solicits donations and spends them, they have met any "economic benefit" test that should be applied under RICO. But there is no necessary causal connection between the contributions of members of such an organization and the specific projects that the organization undertakes. Many contributors give to organizations because they are generally in sympathy with its ends, without analyzing each and every undertaking of the organizations to which they contribute. And donations are, at most, incidentally related to organizational activities, not the direct result of those activities in the way that economic gains are the direct product of traditional RICO crimes.

Amici challenge the notion advanced by the petitioners that a properly managed exempt organization could ever have illegal economic motivation within the meaning of RICO. RICO was clearly aimed at the grossly illegal accumulation of wealth from organized criminal activity. Under I.R.C. § 501(c)(3) and parallel State laws governing nonprofit organizations, however, these exempt organizations may not allow any of their assets to inure to the private benefit of those who control these organizations. Absent a showing that nonprofit managers have attempted to fleece an organization – one not made here by the petitioners and one that cannot be made with respect to any of the *Amici* – no economic motivation should be found. Although it is conceivable that an

exempt organization might be a subterfuge for illegal activity and private gain, remedies for this contingency already exist under federal and State law. Accordingly, there is no need to expand RICO on the basis of the slender reed on which the petitioners rest their claim.

On the flip side of the coin, petitioners' "economic motivation" argument proves too much because *all* voluntary associations, including the National Organization for Women, receive such contributions to support their activities. If they do not, they wither and die. Indeed, such contributions are constitutionally protected. *Buckley v. Valeo*, 424 U.S. 1 (1976). Among other reasons, that is why this Court has been solicitous to protect organizations as diverse as NOW and Operation Rescue from excessive regulation of their charitable solicitation by the several States. *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980).

III. RICO should not be applied to an organization that advocates social or political change without differentiating members of such an organization who know of and authorize illegal tactics by that organization from members who are truly innocent of any illegal act.

Finally, *Amici* wish to focus briefly on the teaching of this Court in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982). That case sets clear limits on the imposition of vicarious or enterprise liability to an entire group for the conduct of some members who might have known of and authorized illegal tactics by that organization, while most of the membership remained truly innocent of any illegal

acts committed by the organization. The *Claiborne Hardware* case is well briefed and argued in the Brief Amicus Curiae submitted by the ACLU on behalf of neither the petitioners nor the respondents. For that reason we do not add many more words on the subject here.

We do wish to emphasize, however, that we are led to a different conclusion from the "plague on both your houses" approach of the ACLU. For us, *Claiborne Hardware* and the other associational freedom cases, *see, e.g., NAACP v. Button*, 371 U.S. 415 (1963), and *NAACP v. Alabama*, 357 U.S. 449 (1958) teach clearly that "it is proper to take alarm at the first experiment on our liberties," James Madison, *Memorial and Remonstrance*, cited in *Everson v. Board of Educ.*, 330 U.S. 1, 65 (1947), not when the last nail is being placed into the coffin. There must be more to the law than the simplistic and stark choice that the petitioners urge here, between fully protected conduct on the one hand or a federal felony offense with severe penalties under RICO on the other. It is hard enough for civil libertarians to sustain a coherent and vigorous defense of the voice of protest in this society, without adding the devastating effect of RICO to diminish or still that voice. If Congress really means to do that to the struggle for the soul of America, let Congress do it, and not this Court.

CONCLUSION

For the reasons set forth in this brief, this Court should affirm the judgment of the Court of Appeals.

Respectfully submitted,

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